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No. 92-1639

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

THE CITY OF CHICAGO, et al.,
Petitioners

v.

ENVIRONMENTAL DEFENSE FUND, INC., et al.,
Respondents

On Writ Of Certiorari To
The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether Section 3001(i) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6921(i), exempts a resource recovery facility that incinerates municipal solid waste from the requirements of Subtitle C of RCRA applicable to hazardous waste generators when that facility generates an ash residue that would otherwise constitute a hazardous waste under RCRA.

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BRIEF FOR RESPONDENTS

STATUTORY PROVISIONS INVOLVED

Section 3001(i) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6921(i), and Sections 1004(6) & (7), 42 U.S.C. 6903(6) & (7), of RCRA, are set forth in an appendix to this brief.

STATEMENT

Respondents Environmental Defense Fund, Inc. and Citizens For A Better Environment brought this action, asserting that petitioner City of Chicago¹ is violating the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*, by failing to

¹ Petitioners City of Chicago and Richard M. Daley, Mayor of the City of Chicago, are referred to collectively in this submission as "the City."

comply with that Act's Subtitle C hazardous waste requirements in handling the hazardous waste ash residue generated by its operation of a municipal solid waste resource recovery facility. The district court granted the City's motion for summary judgment, agreeing with the City that Section 3001(i) of RCRA exempts the City's resource recovery facility from Subtitle C's requirements applicable to hazardous waste generators. The court of appeals reversed. This Court subsequently granted the City's petition for a writ of certiorari, vacated the judgment below, and remanded the case to the court of appeals for reconsideration in light of the views expressed by the Administrator of the United States Environmental Protection Agency (EPA) in a memorandum to regional administrators dated September 18, 1992. On remand, the court of appeals reinstated its earlier judgment.

1. The City of Chicago owns and operates a municipal solid waste resource recovery facility at which it receives and burns solid waste collected from households and commercial enterprises located throughout the City. The resource recovery facility receives 200 to 250 truckloads of refuse each day, totalling 350,000 tons of waste per year. The facility in turn generates 110,000 to 140,000 tons of ash, the toxicity of which is routinely high enough to qualify it as a "hazardous waste" as defined by regulations implementing Subtitle C of RCRA. Between 1981 and 1987, 32 out of 35 samples of ash tested exhibited sufficiently high leachable concentrations of lead, cadmium, or both to be classified a hazardous waste under established EPA testing procedures for the identification of hazardous wastes based on their "toxicity characteristic." Pet. App. 6a. The "toxicity characteristic" measures a waste's potential to leach specified contaminants into the environment above threshold levels deemed hazardous by EPA. Whether a particular waste is hazardous turns therefore on at least two factors: the chemical makeup of the compound and its physical characteristics.²

² At the time EDF commenced this litigation, EPA utilized a process called the "Extraction Procedure" or "EP toxicity test" to determine which wastes exhibit the characteristic of toxicity. EPA currently uses a different process called the "toxicity characteristic

The City, however, has not in the past, and does not currently comply with Subtitle C in transporting, storing, or disposing of the hazardous ash. Pet. App. 6a-7a. The City has not, as is required of generators of hazardous waste, applied for and received an EPA identification number prior to engaging in any of these regulated activities. See 40 C.F.R. 262.12. The City likewise does not purport to comply with packaging, labelling, or container requirements applicable to hazardous wastes. See 40 C.F.R. 262.30-33.

Nor has either the waste hauler hired by the City to transport the hazardous ash,³ or any of the facilities where the ash has been ultimately disposed, met the requirements for Subtitle C transporters or disposal facilities. Until 1987, the City sent its ash to a former limestone quarry, which was not permitted to accept hazardous wastes. R.12 at ¶16. The City also sent the ash to a sanitary landfill in Michigan that failed to comply with the basic design elements of hazardous waste landfills. R.34 at ¶ 24. Among other shortcomings, there was no double liner or double leachate collection system, which are required in licensed hazardous waste landfills to guard against the migration of hazardous constituents into any nearby groundwater supplies. *Id.*; see 42 U.S.C. 6924(o).

2. On January 27, 1988, respondents filed a complaint against the City, alleging that the City was violating Subtitle C of RCRA in its handling of hazardous ash generated at the City municipal solid waste resource recovery facility. The City filed a motion for summary judgment on the ground that RCRA Section 3001(i) exempts from Subtitle C regulation both municipal solid waste and the ash generated from its combustion by a resource recovery facility. The City did not contest respondents' claim that the concentrations of hazardous constituents in the ash would otherwise

leaching procedure" or "TCLP" to make this determination. See 40 C.F.R. 261.24(a).

³ See R.68 at Response 12 ("R.68" refers to item number "68" in the record below).

render it a "hazardous waste" within the meaning of RCRA. Nor did the City contest respondents' assertion that the City was not complying with RCRA's Subtitle C requirements. Pet. App. 6a-7a, 23a-24a. The district court granted the City's motion for summary judgment. Pet. App. 33a. The court concluded that Section 3001(i) exempts hazardous ash that the City's facility generates from Subtitle C.

3. The court of appeals reversed. Pet. App. 5a-21a. Looking to "what the statute actually says," the court of appeals found dispositive that "Section 3001(i) mentions 'the treatment, storing, disposing of or otherwise *managing*' of the household and commercial waste, but fails to include among those activities *generating* a different waste product." *Id.* at 18a (emphasis in original). "It does not follow," the court reasoned, "that the generation of hundreds of tons of a whole new substance with the characteristic of a hazardous waste should be exempt from regulation just because Congress wanted to spare individual households and municipalities from a complicated regulatory scheme if they inadvertently handled hazardous waste." *Id.* The court also stressed that hazardous waste "generation" is excluded from the statutory definition of "management." *Id.* Judge Ripple dissented. *Id.* at 21a.

4. On February 18, 1992, the City of Chicago petitioned (No. 91-1328) for a writ of certiorari. Respondents responded by agreeing that the writ should be granted, but that the judgment of the court of appeals should be affirmed. At this Court's invitation (112 S. Ct. 1932), the Solicitor General filed a brief recommending that the Court grant the petition, vacate the judgment below, and remand for reconsideration in light of a memorandum dated September 18, 1992, which the EPA Administrator distributed to regional EPA offices, that supported the City's position. See Pet. App. 41a-49a. The Court remanded for reconsideration in light of EPA's memorandum. 113 S. Ct. 486 (1992).

5. On remand, the court of appeals reinstated its prior judgment. Pet. App. 1a-4a. According to the court, the "plain

language of the statute is dispositive." *Id.* at 3a. Judge Ripple dissented. *Id.* at 3a-4a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Much about this case is undisputed. The City does not here dispute that the ash that the City's municipal waste incinerator generates is hazardous under EPA's standard testing procedures. There is likewise no dispute that Congress concluded that protection of human health and the environment requires that hazardous wastes be handled only pursuant to RCRA's strict Subtitle C requirements. Nor is there any disagreement regarding the fact that the City's ash, despite its hazardousness, is not being handled in this manner.

This case presents the question whether RCRA Section 3001(i) allows this to occur. Like the court of appeals below, we think not. We do not question the City's claim that Congress intended to promote resource recovery facilities. But, as the appellate court concluded (Pet. App. 20a), it would seem "unlikely," if not entirely "absurd," to suppose "that Congress, in an express effort to promote the proper disposal of dangerous substances that otherwise would seep into the ground and water table, would sanction the dumping of massive amounts of hazardous waste in the form of ash into ordinary landfills."

1. In support, we need go no further than the plain language of the statute, which makes clear that Congress never enacted such a far reaching exemption from the scope of RCRA's rigorous regulation of hazardous waste. Congress instead conferred a regulatory exemption on the City's resource recovery facility that, while quite generous, did not abandon RCRA's environmental protection and waste minimization objectives. Congress exempted the incineration process itself from Subtitle C regulation by providing that the receipt and burning of municipal solid waste shall not be considered the management of hazardous waste, notwithstanding the fact that household waste routinely includes hazardous materials. This exemption relieves the City of many of Subtitle C's most rigorous requirements.

The plain language of Section 3001(i), however, does not exempt from Subtitle C the ash that the City's facility generates. Entirely missing from the statutory language is any suggestion that Section 3001(i) exempts the City's facility as a "generator" of hazardous waste, which is a distinctly regulated activity under RCRA Subtitle C. Nor is there any support for the City's contention that Section 3001(i) exempts those downstream entities that subsequently manage that ash if hazardous. Indeed, Section 3001(i) never even mentions those facilities.

2. The City's proposed construction of Section 3001(i) also cannot be squared with the structure and purpose of RCRA. The environmental and human health costs of extending the legal fiction of nonhazardousness to the ash generated by the City would be enormous. Contrary to the City's claim, RCRA is not a statute that generally exempts resource recovery facilities from Subtitle C regulation. Such facilities are routinely regulated under Subtitle C when they manage hazardous wastes. Congress subordinated the promotion of resource recovery to environmental protection and described its purpose as promoting resource recovery "which preserve[s] and enhance[s] the quality of air, water, and land resources." 42 U.S.C. 6902(a)(10).

3. The relevant legislative history is likewise unavailing to the City. The sharp contrast between the actual statutory language and that contained in a legislative report on which the City relies--the latter purports to add a critical term not present in the statute--only underscores the weakness of the City's argument. Although legislative history may sometimes be relevant to determining the meaning of ambiguous statutory language, it most certainly may not have the practical effect of adding language plainly not in the statute itself.

4. Because, moreover, congressional intent is clear, there is no statutory gap for the agency to fill and EPA's opposing view of the meaning of the statute is entitled to no deference. In addition, the way in which EPA announced its regulatory conversion--rejecting its prior view that Section 3001(i) does not exempt hazardous ash from Subtitle C--renders any judicial deference

inappropriate. EPA's new view is not the result of an exercise of legislatively delegated lawmaking authority, which would be entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). It is not the product of the kind of reasoned decisionmaking process required for legislative rulemaking by the Administrative Procedure Act. Its sole official expression is an internal agency memorandum issued without the safeguards, including public input, that underlie the rationale for judicial deference.

5. Finally, contrary to the City's exaggerated claims, affirming the judgment of the court below will not mean that all municipal incinerator ash is hazardous waste and therefore must automatically be subject to Subtitle C. It simply means that those who generate ash, like generators of other kinds of potentially hazardous waste, must test that waste for its hazardous characteristics and subsequently handle any portion of the ash that is hazardous consistent with Subtitle C. It also means that municipalities will likely take further steps to promote RCRA's primary objectives -- source reduction and waste minimization -- in order to reduce incinerator intake of those constituents that cause the ash residue to be hazardous.

ARGUMENT

I. THE PLAIN LANGUAGE OF RCRA DOES NOT EXEMPT HAZARDOUS ASH GENERATED BY A MUNICIPAL SOLID WASTE RESOURCE RECOVERY FACILITY FROM SUBTITLE C REGULATION

A. This case presents a pure question of statutory construction. "The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hosp. v. Shalala*, 113 S.Ct. 2151, 2157 (1993), quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). In ascertaining whether there is such a "plain meaning," this Court "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp.*

v. *Cartier*, 486 U.S. 281, 291 (1988); *National RR. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992).

The Court may also consider any relevant judicial canons of statutory construction in determining whether the meaning of the statutory language is sufficiently plain to give it controlling weight. See, e.g., *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568 (1988); *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1237 (1991) (Scalia, J., concurring). Of particular relevance to this case is the established canon that "[a]ny exemption from such humanitarian and remedial legislation must * * * be narrowly construed, giving due regard to the plain meaning of the statutory language." *A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945); see *Commissioner v. Clark*, 489 U.S. 726, 739 (1989) ("usually read the exception narrowly in order to preserve the primary operation of the provision"). As the Court explained, the canon's rationale is that "[t]o extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." 324 U.S. at 493.

In this case, the plain language of RCRA creates no exception from Subtitle C for hazardous ash generated from the combustion of household wastes and nonhazardous commercial and industrial wastes. Section 3001(i) provides that "[a] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter * * *." The provision goes on to define what it means by "municipal solid waste" by providing that the facility can "receive[] and burn[] only (i) household waste * * *, and (ii) solid waste from commercial or industrial sources that does not contain hazardous waste * * *." Finally, Section 3001(i) includes certain safeguards against the facility receiving and burning hazardous wastes. The exemption applies only if the facility "does not accept hazardous wastes" and, to that end, requires that "the owner or operator of such facility has established contractual requirements or other appropriate notification or

inspection procedures to assure that hazardous wastes are not received at or burned in such facility."

The plain meaning of this language is that the "municipal solid waste" that the incinerator receives and burns shall not be considered a "hazardous waste" if the City recovers energy from the process and follows certain procedural safeguards. The legal effect of such a legislative determination is, as the statute expressly provides, that a municipal incinerator's receiving and burning of municipal waste "shall not be deemed to be treating, storing, or disposing of, or otherwise managing hazardous wastes" within the meaning of Subtitle C.

In this case, therefore, the City cannot be considered a treatment, storage, or disposal ("TSD") facility subject to the strict permitting requirements set forth in RCRA Subtitle C and in EPA's implementing regulations. Section 3001(i) exempts the City's resource recovery facility from those requirements, notwithstanding its receipt and burning of household waste that, as the City correctly acknowledges (Br. 4), "sometimes contains some components that qualify as hazardous waste under the federal scheme."

Significantly, at the time Congress enacted Section 3001(i) in 1984, there was no explicit statutory language in RCRA allowing for any household waste exclusion.⁴ In addition, EPA's then-existing regulation excluding household waste from Subtitle C regulation did not extend to a resource recovery facility that mixed household wastes with nonhazardous commercial and industrial waste. However, to be economical, those facilities needed the volume of waste supplied by those additional sources. Facility operators also harbored a very real concern that their inadvertent receipt of hazardous waste would cause a municipal incinerator to be deemed a hazardous waste treatment, storage, or disposal facility. See 50 Fed. Reg. 28726 (1985).

⁴ The exclusive support for that regulatory exclusion was language contained in a legislative report accompanying RCRA in 1976. See S. Rep. 94-988, 94th Cong., 2d Sess. 16 (1976).

Section 3001(i) addressed these concerns. It allowed a household waste exclusion in the resource recovery context. It also allowed a resource recovery facility to mix household wastes with nonhazardous wastes from other sources. And Section 3001(i) conditioned the exemption on the owner or operator of the facility establishing "appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility," rather than on an absolute guarantee from the facility that no hazardous wastes had in fact been received or burned.

Contrary to the City's contention (Br. 22, 23), such an exemption is hardly so "implausibly narrow" as to amount to an "empty gesture." The most rigorous, far-reaching, and costly aspects of RCRA's Subtitle C are its requirements applicable to TSD facilities. As described by one commentator, "[a]ny person engaged in the treatment, storage, or disposal of any hazardous waste * * * is subject to the very strict, complex, and expensive regulatory requirements of RCRA. * * * The full brunt of EPA's enforcement efforts under RCRA tends to be focused on the owners and operators of TSD facilities * * *." Michael Gerrard, 3 Environmental Law Practice Guide §29.05[1], p. 29-52 (1992).

Perhaps most significantly, by virtue of their not being considered TSD facilities, municipal waste incinerators are not subject to corrective action and closure, and financial assurance requirements, which are likely the most expensive and far-reaching regulatory requirements added by HSWA.⁵ A successful TSD

⁵ Subtitle C's TSD requirements are set forth in RCRA at 42 U.S.C. 6924 and in EPA's implementing regulations at 40 C.F.R. Pts 264, 265, and 270. Corrective action requires all TSD permittees to clean up all solid waste management units located on the same facility, regardless of when the units were created or closed. 42 U.S.C. 6924(u),(v). "This corrective action requirement is one of the major reasons that generators and transporters work diligently to manage their wastes so as to avoid the need to obtain a * * * TSD permit." Gerrard, § 29.06[3][d] p. 29-69. EPA estimates the total national cost of complying with corrective action as between 7 and

permitting process takes an average of four and one-half years to complete and, in light of the rigorous regulatory requirements, many applications are not successful. See USEPA Office of Solid Waste and Emergency Response, *The Nation's Hazardous Waste Management Program at a Crossroads: The RCRA Implementation Study*, 49-50 (1990). Thus, rather than being "implausibly narrow" (Pet. Br. 22), the plain meaning of Section 3001(i) confers a substantial and generous regulatory exemption on the City's incinerator.

B. The City, however, proposes a far more expansive view of Section 3001(i). It contends that the plain meaning of Section 3001(i) goes further than to dictate the circumstances when municipal solid waste shall not be considered hazardous waste. According to the City, the language of Section 3001(i) unambiguously expresses the additional congressional intent that the ash produced from the incineration process shall not be considered a "hazardous waste" within the meaning of RCRA even where, as is not contested by the City here, that ash exhibits one of the EPA-defined characteristics of a hazardous waste. Based on this reasoning, the City asserts that it cannot be considered to be managing a hazardous waste when it manages the ash. And, taking its position to its logical extreme, the City further contends that those entities with whom the City arranges to transport, treat, store, dispose, or reuse the hazardous ash are likewise exempt from Subtitle C.

The plain language of Section 3001(i), however, admits of no such possible construction. The ash produced by the incinerator is nowhere mentioned in the provision. The only waste that is the subject of the exemption is the municipal solid waste that the

42 billion dollars. 55 Fed. Reg. 30798, 30861 (1990). Closure provisions require that the TSD facility "clean close" by removing all wastes (40 C.F.R. 264.351); and financial assurance regulations are intended to ensure that each TSD owner or operator will actually have the financial resources necessary for closure and for liability for sudden accidental occurrences (40 C.F.R. 264.143, 264.147(a)).

incinerator receives and burns. The statute does not purport to address the status of the ash that is produced from incineration.

In particular, missing from the statutory language is any suggestion that the facility shall not be deemed to be "generating" a hazardous waste in the event that the ash produced contains high levels of hazardous constituents in a leachable form. Nor is there any suggestion in the statutory language that those downstream regulated entities who subsequently transport, treat, store, and dispose of the hazardous ash are not "managing" hazardous waste, within the meaning of RCRA. Indeed, Section 3001(i) never even mentions those downstream from the municipal waste facility.

The City advances (Br. 14-17) several textual arguments to support its insistence that the plain language supports its view. We address each in turn below. None is persuasive.

1. First, there is no merit to petitioners' claim that the reference in Section 3001(i) to "otherwise managing" extends to "generating" a hazardous waste. In RCRA, Congress carefully and precisely defined the terms "management" and "generation" in a manner that provides, as the court of appeals explained, for "no overlap whatsoever" (Pet. App. 19a). RCRA defines "hazardous waste generation" as "the act or process of producing hazardous waste." 42 U.S.C. 6903(6). "Hazardous waste management" is defined as "the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes." 42 U.S.C. 6903(7).⁶ Hence, "otherwise managing" in Section 3001(i) refers to those specific management activities not "otherwise" expressly listed in

⁶ The distinction between generation of hazardous waste and the management of hazardous waste, including its disposal, is further revealed in RCRA's detailed statutory scheme, which sets out separate and exclusive regulatory schemes for these various activities. Compare 42 U.S.C. 6922 (generators) with 42 U.S.C. 6923 (transporters) and 42 U.S.C. 6924 (TSD facilities); and compare 40 C.F.R. Pt 262 (generators) with Part 263 (transporters) and Parts 264-265 (TSD).

the provision. These include "collection," "source separation," "transportation," "processing," and "recovery." By clear statutory definition, "otherwise managing" does not include "generation."

2. Likewise lacking merit is the City's contention (Br. 15) that the word "disposing" in Section 3001(i) denotes clear congressional intent to exempt hazardous ash from the requirements of Subtitle C. Otherwise, the City argues (Br. 22), the word "disposal" would have no meaning because the hazardous ash is the only substance that the resource recovery facility is disposing. This is simply not so. The plain meaning of this clause is that the incinerator shall not be deemed to be "disposing" of hazardous waste either when it burns municipal waste that it receives or when it disposes of (or, more likely arranges for the disposal of) municipal solid waste that the incinerator receives, but does not burn.

The City's facility engages in two distinct activities that, absent Section 3001(i), might have been deemed "disposing" of hazardous waste. First, there is the burning process itself, during which the municipal solid waste is incinerated. Section 3001(i) makes plain that the incineration process does not constitute the disposal of hazardous wastes, notwithstanding the fact that the facility is destroying some of the hazardous constituents known to be in household wastes.

Second, there is the City's disposal of the waste that the facility receives, but does not burn. The source of the City's error in this regard lies in its failure to consider that municipal waste incinerators decline to burn approximately 30 percent of the municipal solid waste they receive.⁷ The incinerator is therefore

⁷ Significant amounts of waste received at a resource recovery facility typically must be disposed of directly, rather than being incinerated. These wastes include (a) unprocessable wastes; and (b) bypass wastes, such as wastes received in excess of capacity during peak generation times or during incinerator shutdowns for repairs. These wastes constitute approximately 30 percent of the waste that the municipal incinerator receives. Municipal Incinerators: Fifty

obliged to arrange for the disposal of substantial amounts of municipal solid waste. The clear advantage of Section 3001(i) in this respect is that it provides that the incinerator's disposing of such municipal waste will not trigger Subtitle C.

It is therefore simply not true that the word "disposing" in Section 3001(i) must apply to the ash generated by the incinerator to have any meaning. "Disposing" has great significance when applied to the sole waste referred to by Section 3001(i), which is the "municipal solid waste" that the incinerator receives and burns.

3. The City also argues (Br. 14-15) that the City cannot be considered a "generator" of hazardous waste because it is burning material that is already a waste. A variant of this argument is that the City is simply "treating" waste and the statutory exception clearly applies to the treatment of hazardous waste. See Pet. Br. 17. In each instance, we agree with the premise but dispute the conclusion.

Petitioners mistakenly assume that because the *treatment* of one kind of waste may result in the *generation* of another kind of hazardous waste, a statutory exemption applicable to the former activity must extend to the latter as well. The short answer is that such an assumption is improper where the two activities trigger distinct statutory requirements directed to different kinds of risks. See note 6, *supra*. Notions of proximate cause simply do not trump clear statutory definitions. Compare 42 U.S.C. 6903(6) (defining "hazardous waste generation") with 42 U.S.C. 6903(34) (defining "treatment").

Equally unpersuasive is the City's related, curious claim (Pet. Br. 17) that one cannot "generate" hazardous waste from materials that themselves constitute solid waste. RCRA's clear statutory definitions, however, show otherwise. The term "generator" is not defined by statute, but "hazardous waste generation" is, and it "means the act or process of producing hazardous waste." 42

U.S.C. 6903(6). Contrary to the City's reasoning, there is no exception for an "act or process of producing hazardous waste" when the process involves waste in the first instance. The sole inquiry is whether hazardous waste is produced.

Indeed, were the rule otherwise, any kind of facility that treated waste would be exempt from the Subtitle C generator regulations even when that treatment produced a residue that itself qualified as a hazardous waste. For instance, an incinerator that burned industrial waste for the sole purpose of its destruction (recovering no energy) would not be subjected to the requirements applicable to a generator of hazardous waste when the incinerator subsequently arranged for another entity to transport, treat, store, or dispose of the waste. See 40 C.F.R. Pt 262. The facility would be free of RCRA's requirement that all hazardous wastes be accompanied by a manifest as well as of the obligation to ensure that the waste was disposed of at a permitted TSD facility. 40 C.F.R. 262.20(a). Not surprisingly, the statutory language provides no hint of such a massive loophole to Subtitle C. And, EPA's regulations expressly deny the existence of such a blanket exemption by providing that "any solid waste *generated* from the treatment * * * of a hazardous waste, including any * * * ash * * * is a hazardous waste." See 40 C.F.R. 261.3(c)(2)(i) (emphasis added); see also 40 C.F.R. 262.10(f) ("An owner or operator who initiates a shipment of hazardous waste from a treatment, storage, or disposal facility must comply with the generator standards established in this part.").

Nor, contrary to the City's intimation, does it make a difference that the chemical constituents that make the ash hazardous originate in the waste processed by the incinerator. To be sure, metals such as cadmium and lead are chemical elements and therefore cannot be created or destroyed by the incineration process. But what the City wrongly assumes from that premise is that the ash produced by incineration is therefore a mere subset of the combusted waste. In fact, the two wastes are completely different. The waste stream is physically and chemically transformed during the combustion process. Wholly apart from

the household waste exclusion, the combustion of nonhazardous waste can routinely create a hazardous waste-ash residue.

As described above (see page 2, *supra*), it is the concentration of hazardous constituents and their susceptibility to leaching in their current physical state that determine whether a given waste is considered "hazardous" under EPA's toxicity characteristic. In the case of incinerator ash, what makes the ash hazardous is the way in which the incineration process dramatically increases the concentration of hazardous constituents and, by placing them on a substance (ash) with a disproportionately high degree of surface area, makes those higher concentration levels far more susceptible to leaching. See R.34 at ¶¶ 10, 17. Simply put, the physical makeup of the hazardous waste produced or generated by incineration is dramatically different from the waste that is combusted. The combustion of nonhazardous waste may, therefore, produce (*i.e.*, generate) an ash that constitutes a hazardous waste.

4. The City's final textual argument for its proffered interpretation is a variant on its general theme that inclusion of the word "generating" is not necessary for Section 3001(i) to exempt ash that fails the toxicity characteristic test. The City contends (Br. 16) that "generating" is not necessary because Section 3001(i) provides that a municipal incinerator shall not be deemed to be managing hazardous waste, which is ultimately what EDF contends, and the court of appeals held, that the City is doing. The City's argument is fatally flawed in several respects.

a. First, the City's argument takes the deeming clause of Section 3001(i) wholly out of context. The only waste to which that clause applies is the sole waste expressly mentioned in Section 3001(i): the "municipal solid waste" that is being received and burned. We agree that the City's management of that waste cannot be considered managing "hazardous waste." That is, after all, what the statute plainly says. But what the statute plainly does not say is that the same exemption applies to the Subtitle C requirements applicable to a generator of a new and very different

waste -- ash -- that would otherwise constitute a hazardous waste under RCRA.

b. Second, the City's management of the hazardous ash is not, in any event, the sole focus of the City's legal argument. The City asks the Court to conclude that the plain meaning of Section 3001(i) is that neither the City nor those entities which *subsequently* transport, treat, store, dispose, or reuse the hazardous ash are managing a hazardous waste even when that ash fails EPA's toxicity characteristic analysis. There is simply no basis in the plain language of Section 3001(i), however, to conclude that such a downstream or "waste stream" exemption exists. Those downstream entities are never mentioned. The "resource recovery facility recovering energy from the mass burning of municipal solid waste" is the only entity mentioned in Section 3001(i) that "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter." 42 U.S.C. 6921(i). There is no parallel exemption for any other entity that is subsequently "treating, storing, disposing of, or otherwise managing" the hazardous ash.

c. Indeed, that is the very reason why the City is mistaken in contending that the omission of the word "generating" from Section 3001(i) is meaningless because, the City argues, it is unnecessary to their argument. The word "generating" is, as a practical matter, absolutely essential to the City's position and therefore its absence is fatal to the City's claim. What the City is seeking to avoid in this case is paying landfill disposal operators the higher costs of disposing of hazardous ash in a Subtitle C landfill. Whether those costs are incurred in this case does not depend so much on whether the City is managing hazardous waste as it does on whether those disposal facilities are managing hazardous waste. For, if they are, those disposal facilities will charge the City accordingly. But, without the word "generating" in Section 3001(i), there is not even the barest support in the plain meaning of Section 3001(i) for such a downstream exemption.

Any possible doubt in this regard is eliminated by comparing the language of Section 3001(i) to the language of a different provision of RCRA, which shows that Congress knew how to draft a waste stream exemption in RCRA when it wanted to. It also demonstrates that Congress knew how to include the word "generating" -- the precise word missing from Section 3001(i) -- to create such a waste stream exemption. Congress provided in its note to 42 U.S.C. 6921 that an "owner and operator of equipment used to recover methane from a landfill shall not be deemed to be managing, *generating*, transporting, treating, storing, or disposing of hazardous or liquid wastes within the meaning of" Subtitle C. See 42 U.S.C. 6921 note (emphasis added), added by Pub. L. No. 99-499, Title I, § 124(b), 100 Stat. 1689 (1986). Congress included the precise term of art missing from Section 3001(i).⁸

d. The absence of any plain language support for a downstream exemption supplies yet another reason for rejecting the City's assertion that Section 3001(i) applies to the City's generation of the ash. A regulatory scheme in which the City is relieved of its Subtitle C responsibilities as a generator of hazardous waste, but downstream entities transporting, treating, storing, and disposing of that ash are not, would be completely unworkable. A TSD facility, for instance, would be responsible for complying with Subtitle C in its management of the ash when hazardous, but

⁸ Significantly, however, even in declaring such a downstream exemption, Congress took care to limit its reach to avoid the very kinds of adverse environmental effects that the City nonetheless claims are permitted by Section 3001(i). Congress added to 42 U.S.C. 6921 note the caveat that if any of the resulting material "meets any of the characteristics identified under Section 3001 of subtitle C * * *, the preceding sentence shall not apply and such * * * waste material shall be deemed a hazardous waste * * * and shall be regulated accordingly." In other words, Congress limited the application of the downstream exemption when necessary to ensure that a waste that was in fact hazardous would be managed accordingly. In this case, Congress did not even create a downstream exemption in the first instance, so Congress' careful drafting of 42 U.S.C. 6921 note is doubly fatal to the City's argument.

the generator would never have performed the threshold identification and manifest procedures that are essential to the success of the regulatory program. See 42 U.S.C. 6922(a)(5). That is simply nonsensical. How would a transporter know that it was receiving a hazardous waste if the Subtitle C manifest system requirements did not apply to the generator of the waste in the first place?

But that is the very reason why it is wrong to suppose that Congress intended to extend the exemption to the generation of ash at all. Congress would not have exempted the resource recovery facility from complying with the Subtitle C requirements applicable to a generator of hazardous waste without likewise exempting those downstream by creating a waste stream exemption. And, because Congress plainly did not do the latter in Section 3001(i), the City's tortured construction that Congress did the former should likewise be rejected.

II. RCRA'S OBJECT AND STRUCTURE ARE CONSISTENT WITH THE VIEW THAT SECTION 3001(i) DOES NOT EXEMPT HAZARDOUS ASH FROM SUBTITLE C

"[T]he object and structure of the Act as a whole" likewise support the view that Section 3001(i) does not provide a wholesale exemption from Subtitle C for municipal incinerator ash. *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990). Congress announced two national policies in RCRA: "the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible" and "[w]aste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." 42 U.S.C. 6902(b). Our view that the plain language of Section 3001(i) does not exempt the City's ash, when hazardous, from Subtitle C regulation is consistent with both these purposes.

By contrast, the City's reading would make a mockery of Congress' effort in RCRA to protect human health and the environment and to minimize the generation of hazardous waste. The City's claim that its view is nonetheless consistent with

RCRA's purposes both misreads the extent of Congress' desire in RCRA to promote resource recovery and misapprehends the relationship of that resource recovery goal to municipal solid waste incineration.

A. When Congress enacted RCRA in 1976, it sought to "eliminate the last remaining loophole in environmental law" by creating a comprehensive "cradle to grave" federal program for the management of hazardous waste to protect human health and the environment. H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. 4,5 (1976); see *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2011 n.1 (1992). In RCRA Subtitle C, Congress required EPA to create a regulatory program applicable to the generation, transportation, treatment, storage, and disposal of hazardous waste. Congress conferred on EPA great discretion in determining the substance of those rules. EPA's sole mandate was to establish standards "as may be necessary to protect human health and the environment." Pub. L. No. 94-580, §§ 3002-3004, 90 Stat. 2806-2808 (1976).

When Congress enacted the Hazardous and Solid Waste Amendments of 1984 (HSWA), Pub. L. 98-616, 98 Stat. 3221 (1984), which substantially amended RCRA, Congress adopted a very different approach to the problem and to EPA. HSWA grew out of congressional disappointment with EPA's implementation of the 1976 RCRA law. S. Rep. No. 98-284, 98th Cong., 1st Sess. 2-4 (1983); H.R. Rep. No. 98-198, 98th Cong., 2d Sess. Pt. 1, 20 (1983); H.R. Rep. No. 97-570, 97th Cong., 1st Sess. 10 (1982). Congress sought to correct "serious gaps in RCRA's current regulatory systems" (H.R. Rep. No. 98-198, at 20) or, as described by EPA, to "close the loopholes in the types of wastes and waste management facilities not covered under RCRA" (USEPA Office of Solid Waste and Emergency Response, *The Nation's Hazardous Waste Management Program at a Crossroads*, 7 (1990)).

Hence, "Congress broadened the scope of the statute and tightened the regulatory restraints in 1984." *MidAtlantic National Bank v. New Jersey Department of Environmental Protection*, 474

U.S. 494, 506 (1986). Congress lowered the threshold for the small quantity generator exemption from 1000 kg to 100 kg of hazardous wastes per month (42 U.S.C. 6921(d)) and tightened up the process for delisting a waste as hazardous (42 U.S.C. 6921(f)). Congress required EPA to list more wastes as hazardous, add hazardous characteristics, and strengthen agency testing procedures (42 U.S.C. 6921(e), (f), and (g)). Congress also banned altogether the land disposal of certain wastes and allowed the land disposal of other wastes only if EPA promulgated within a prescribed time period predisposal treatment standards to reduce hazardousness (42 U.S.C. 6924(d)-(h)). Finally, Congress mandated that hazardous waste landfills meet certain minimum technological requirements, including double liners, leachate collection systems, and monitoring wells (42 U.S.C. 6924(o)).

Congress understood, and specifically found in HSWA, that "the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment." 42 U.S.C. 6902(b)(5). The entire thrust of the amendments was therefore toward increased stringency, closing loopholes, speeding implementation, and assuring the proper handling and disposal of hazardous wastes. HSWA reflects Congress' "undisputed concern over the risks of the improper storage and disposal of hazardous and toxic substances." *MidAtlantic National Bank*, 474 U.S. at 506.

It would be altogether incongruous for the Congress so concerned with the integrity of Subtitle C as to impose its requirements on dry cleaners and other small quantity generators producing a mere 100 kg of hazardous waste a month, simultaneously to create a wholesale exclusion for the hazardous wastes that municipal resource recovery facilities generate.⁹ It

⁹ The approximately 175,000 generators of 100 to 1000 kilograms of hazardous waste per month that Congress placed under Subtitle C in 1984 generate an estimated 760,000 tons of hazardous waste per year. See USEPA, *National Small Quantity Hazardous Waste Generator Survey*, 30-31 (Feb. 1985). By contrast, municipal resource recovery facilities generate approximately 8.5 million tons

would likewise be incongruous for that same Congress, which was so concerned about the dangers presented by the land disposal of hazardous wastes that it mandated predisposal treatment and minimum technological requirements for landfills, to allow the City to evade such treatment and technological requirements in disposing of its hazardous ash on land.

Such a reading of RCRA Section 3001(i) would also fly squarely in the face of Congress' related concern in enacting HSWA to avoid creating more abandoned and inactive hazardous waste sites requiring the enormous expenditure of cleanup monies under the federal Superfund law. See Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.* Congress included in HSWA the specific finding that "if hazardous waste management is improperly performed in the first instance, corrective action is likely to be expensive, complex, and time consuming." 42 U.S.C. 6901(b)(6). Congress understood that if the regulatory gaps were not closed, "little more will be done than to contribute to future burdens on the 'Superfund' program." H.R. Rep. No. 98-198, 98th Cong., 1st Sess. Pt. 1, 20 (1983).¹⁰

It is no mere legal technicality that the City's incinerator ash fails EPA's toxicity characteristic analysis. That determination,

of ash per year. See *Amici Br. Barron County, WI, et al.* 6.

¹⁰ Because the City would itself be a liable party under CERCLA for the huge cost of cleaning up any Superfund sites resulting from ash contamination, it is hard to imagine that Congress would have created such an exemption even if it wished to reduce the regulatory burden on municipalities. A waste that is not considered hazardous under RCRA only because of that Act's household waste exclusion nonetheless constitutes a "hazardous substance" within the meaning of CERCLA, 42 U.S.C. 9601(14). See, e.g., *B.F. Goodrich v. Murtha*, 958 F.2d 1192 (2d Cir. 1992); *Anderson v. Minnetonka*, 1993 U.S. Dist. Lexis 4846 (D. Minn. 1993); *State of New Jersey v. Gloucester*, 821 F. Supp. 999 (D. N.J. 1993). That is certainly EPA's position. See 57 Fed. Reg. 51701 (1989).

which the City does not here dispute, is based on the high concentration of heavy metals on the ash, and the susceptibility of those metals when concentrated on the surface of ash-like material to leach out of landfills.¹¹ The release of these high concentrations of heavy metals, moreover, presents very real and significant human health and environmental risks. Lead, for example, "is the number one environmental poison for children. Lead is a poison that affects virtually every system in the body." *Lead Poisoning, Hearings before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 25 (1991) (testimony of Vernon Houk, Director, U.S. Center for Disease Control); see USEPA, *Strategy for Reducing Lead Exposure*, 1 (1991) ("Lead is a highly toxic metal,

¹¹ The City (Pet. Br. 31 n.10) and virtually all of its supporting amici rely on a recent study to support their claim that the ash generated by an incinerator that utilizes a scrubber is less hazardous because "[t]he lime used in the scrubber systems * * * gives the ash a concrete-like character that binds heavy metals, such as lead and cadmium, into the ash, so that they are not released into the leachate or the environment." Even accepting the validity of that claim (which a more recent EPA study would seem to question (see David Kosson, Teresa Kosson, & Hans van der Sloot, *Evaluation of Solidification/Stabilization Treatment Processes for Municipal Waste Combustion Residues*, 127, 129, 150 (USEPA Risk Reduction Engineering Laboratory, 1993) (No. CR 818178-01-0)), what the City conveniently ignores is that not all municipal waste resource recovery facilities use scrubbers. Indeed, the City's own facility does not apparently have such a scrubber, but utilizes only electrostatic precipitators. See R.19 Ex. I (brochure describing City facility); *The 1992 Municipal Waste Combustion Guide*, WASTE AGE, 99, 104-105 (Nov. 1992). It ill behooves the City to rely on a technology that not only is not required, but that the City reportedly is not even using. In any event, even if the City were correct, the absence of hazardousness might simply mean that the ash would not fail the EPA toxicity characteristic analysis in the first instance.

producing a range of adverse health effects, particularly in children and fetuses."').¹²

For this reason, the various claims made by amici supporting the City regarding the potential beneficial reuses of hazardous ash (e.g., road construction, cement manufacturing) are especially misguided. See, e.g., Amicus Br. National League of Cities 5-6; Amicus Br. Barron County, Wisconsin 18. It is precisely those kinds of reuses, which are not subject to any regulatory oversight under Subtitle D, that may present the greatest potential hazards. Because ash utilization (e.g., in road building or other construction activities) allows the placing of hazardous ash or hazardous ash-derived products into the general environment, rather than into a controlled disposal environment, it implicates potential exposure pathways that extend far beyond those from ash disposal, both in magnitude and duration.¹³

Indeed, much of RCRA Subtitle C and EPA's implementing regulations are specifically designed to guard against the dangers that the unrestricted reuse of hazardous wastes present. Congress, in Subtitle C, specifically singled out for express prohibition the use of hazardous waste "for dust suppression or road treatment." See 42 U.S.C. 6924(l). And, consistent with congressional intent

¹² As described, *infra*, at pages 47-49, there is no merit to the City's apparent assumption (Br. 34) that EPA's new Subtitle D regulations applicable to municipal waste landfills will guard against those risks. See 40 C.F.R. Pt 258.

¹³ See *Resource Conservation and Recovery Act Amendments of 1991, Hearings Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 102nd Cong., 1st Sess., Pt. 2, 235 (1991) (testimony of Henry S. Cole, Director, Clean Water Action). EPA has accordingly previously stated that "[i]t is not clear that potential re-use mitigates environmental contamination." See USEPA Office of Research and Development, *Methodology for Assessing Environmental Releases of and Exposure to Municipal Solid Waste Combustor Residuals*, 4-8 to 4-10 (April 1991) (EPA/600/8-91/031).

in RCRA, EPA has broadly defined the meaning of "waste" under Subtitle C to include many activities that involve the reuse of hazardous waste, in order to ensure that such activities do not escape Subtitle C's strict scrutiny.¹⁴

Under the City's reading, however, none of these possible reuses of hazardous ash would be prohibited or even restricted. The possibility of such reuses is, according to the City's amici, a reason why hazardous ash containing high levels of lead and cadmium should *not* be subject to Subtitle C. We cannot agree. And, more importantly, the language of Section 3001(i) does not support the City's contention that Congress intended to endorse such a perverse and dangerous result.

B. Our reading of Section 3001(i) is also directly supported by RCRA's overriding policy "that wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible." 42 U.S.C. 6902(b). If, as we believe was Congress'

¹⁴ In 1985, EPA addressed the issue of the extent to which hazardous byproducts should be considered "hazardous waste" when those byproducts are subject to potential beneficial reuses. EPA rejected a definition of "solid waste" within the context of Subtitle C that would have had the effect of removing these reusable hazardous materials from Subtitle C regulation. See 40 C.F.R. 261.2 (defining "solid waste" for purposes of Subtitle C); 40 C.F.R. 261.4 (exclusions from definition of "solid waste"). According to the agency, "regulation of most of these activities is necessary to protect human health and the environment. * * * * * Simply because a waste is likely to be recycled will not ensure that it will not be spilled or leaked before recycling occurs." 50 Fed. Reg. 617. EPA even addressed the risks created by the very kinds of reuses that the City and its amici propose for hazardous ash, and the agency concluded that those activities should be subject to Subtitle C regulation. *Id.* at 628 (emphasis in original) (Subtitle C "appl[ies] not only to hazardous secondary materials used on the land without significant change but also to *all* products containing these wastes that are applied to the land * * *. Thus, fertilizers, asphalt, and building foundation materials that use hazardous wastes as ingredients and are then applied to the land are subject to RCRA jurisdiction.").

intent, municipalities must pay the higher cost of disposing of hazardous ash at a facility designed for hazardous waste, they will likely take the steps now readily available to minimize their generation of hazardous ash.

For instance, the City could separate bottom ash from fly ash.¹⁵ Fly ash typically constitutes only about ten percent of the weight of the ash generated, and is the material far more likely to fail the toxicity characteristic analysis. See *Regulation of Municipal Solid Waste Incinerators, Hearing before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce on H.R. 2162*, 101st Cong., 1st Sess. 43 (1989) (testimony of Sylvia K. Lowrance, Director, USEPA Office of Solid Waste) (hereinafter "*House Hearing on H.R. 2162*"). Like most municipalities, the City of Chicago currently combines these two kinds of ash for disposal, thereby substantially increasing the volume of hazardous waste produced.

In addition, the City could reform its waste collection and incinerator intake processes to reduce the likelihood of any of the ash residue being hazardous. For instance, greater emphasis on materials recovery designed to eliminate materials such as discarded batteries and other identifiable sources of toxic heavy metals from that combusted could dramatically reduce the likelihood that the resulting ash is hazardous. Programs aimed at reducing household disposal of batteries, such as deposit/refund initiatives, could also have a significant beneficial impact. See generally Franklin Associates, *Characterization of Products Containing Lead and Cadmium in Municipal Solid Waste in the*

¹⁵ Fly ash consists of small particles that travel outside of the combustion chamber where the ash is collected by pollution control devices. Bottom ash is the material that remains on the bottom of the combustion chamber. Because many metals vaporize during the intense heat of incineration, move up the stack, and condense on particulate matter, the concentration of leachate metal on ash tends to be higher on fly ash than on bottom ash. Richard A. Denison & John Ruston, *Recycling & Incineration -- Evaluating the Choices*, 177, 184 (1990).

United States 1970 to 2000 (EPA Office of Solid Waste, January 1989); *Resource Conservation and Recovery Act Oversight, Hearings Before the Subcomm. on Hazardous Wastes and Toxic Substances of the Sen. Comm. on Environment and Public Works*, 100th Cong., 1st Sess. Pt. 2, 5-11 (1987); Peter Menell, *Beyond the Throwaway Society: An Incentive Approach to Regulating Municipal Solid Waste*, 17 Ecol. L. Q. 655 (1990). Such measures would further RCRA's stated purpose to "minimiz[e] the generation of hazardous waste and the land disposal of hazardous waste by encouraging * * * materials recovery." 42 U.S.C. 6902(6).

C. The City's claim that a broad reading of Section 3001(i) is in fact supported by RCRA's purposes rests on a series of erroneous assumptions regarding the relationship of Subtitle C to resource recovery facilities. The City's contention is also rooted in gross exaggerations of the likely impact on municipal waste incinerators of requiring hazardous ash, like other hazardous wastes, to be subject to the safeguards of Subtitle C.

1. At the outset, the City's argument based on RCRA's purposes, like its earlier plain meaning argument, rests on the mistaken assumption that Section 3001(i) confers no meaningful benefit on its resource recovery facility unless it exempts the ash from Subtitle C regulation. As previously described (see pages 10-11), quite the opposite is true. Under the court of appeals' construction, which we support, Section 3001(i) provides the City with a generous regulatory exemption by deeming the "municipal solid waste" that it receives and burns not to be a hazardous waste, notwithstanding that household waste is known to include hazardous constituents. The effect of that legal fiction is that the City avoids many of Subtitle C's most demanding requirements.

2. The City is likewise mistaken in describing the extent to which Congress desired to promote resource recovery at the expense of environmental protection and human health concerns. The City contends (Br. 13) that "[t]o encourage resource recovery, Congress exempted resource recovery facilities from the complex regulations governing hazardous waste by enacting Section 3001(i)

of RCRA." Contrary to the City's contention, however, facilities that recover resources (whether in the form of energy or materials) from hazardous wastes are *not* exempt from, but are instead generally subject to the full panoply of Subtitle C regulations when those facilities manage or generate hazardous waste. The recycling or re-use of a hazardous waste for beneficial purposes does not automatically remove the waste from Subtitle C regulation. See 40 C.F.R. 261.2, 261.3; 50 Fed. Reg. 616-620 (1985); see note 14, *supra*. Nor does the burning of a hazardous waste to recover energy justify an exemption. Incinerators, boilers, and industrial furnaces that burn hazardous waste to recover energy are all generally subject to Subtitle C. See 40 C.F.R. Pt 264, Subpt O; 56 Fed. Reg. 7133-7240 (1991). Indeed, in enacting HSWA, Congress reversed a prior EPA policy that had exempted facilities that burned hazardous waste for the purpose of recovering energy from Subtitle C. See 42 U.S.C. 6924(q); *Resource Conservation and Recovery Act Reauthorization, Hearings before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 97th Cong., 2d Sess. 273-75 (1982); *Solid Waste Disposal Act Amendments of 1983, Hearings before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 98th Cong., 1st Sess. 195-97 (1983); see also 42 U.S.C. 6924(o)(1)(B).

Hence, at least Congress does not appear to share the City's belief (Br. 21) that if resource recovery facilities are "subject to Subtitle C regulation, there could be no meaningful chance to achieve the statutory goal of promoting resource recovery." Congress instead plainly subordinated the promotion of resource recovery to the protection of human health and the environment. Congress thus stated RCRA's purpose as "promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources." 42 U.S.C. 6902(a)(10) (emphasis added).

The City's misreading of RCRA purposes and Section 3001(i) appears to derive from its wrongly assuming that recovery of energy from municipal waste combustion is the only type of

resource recovery facility that Congress sought to promote. RCRA defines "resource recovery" far more broadly, however, to mean "the recovery of material or energy from solid waste." 42 U.S.C. 6903(22). Because, moreover, other types of resource recovery facilities are, unlike the City's facility, subject to Subtitle C, the City is particularly hard pressed to claim that fulfillment of RCRA's resource recovery goals require extending Section 3001(i) beyond its plain terms to include the newly generated hazardous ash and thereby exempt downstream facilities that subsequently manage that hazardous ash.

The human health and environmental implications of such an expansion of Section 3001(i) beyond its narrow terms would also be enormous. The implications of our literal reading of Section 3001(i)-- which allows that the resource recovery facility is not managing hazardous waste in its receipt and burning of municipal solid waste--are more confined, even though household wastes may include modest amounts of hazardous materials. The resource recovery facility incinerates the municipal solid waste that it receives and its air emissions are subject to the Clean Air Act. See 42 U.S.C. 7429.

By contrast, the human health and environmental risks associated with a waste stream exemption that extends to ash, which the City proposes, are far greater. Those risks do not end at the resource recovery facility. That is instead where they begin. The operator of the facility and others who subsequently manage the hazardous ash it produces are permitted to treat, store, dispose, and reuse a hazardous waste throughout the nation as though the waste does not contain the hazardous substances that it does in fact contain.

Finally, the City greatly overstates the negative impact on municipal waste combustion facilities of applying Subtitle C to its hazardous ash.¹⁶ Affirming the court of appeals' judgment would

¹⁶ The briefs submitted by the City and its amici also consistently exaggerate the benefits of municipal solid waste incineration. For instance, the amicus brief filed on behalf of the

not mean that all incinerator ash would automatically be considered a hazardous waste. Only that ash exhibiting the kind and concentration of hazardous constituents and characteristics that are the subject of EPA's testing procedures would be so classified. Here, the hazardousness of the City's ash is not disputed for the purposes of this litigation. But there is no reason to assume that all ash would be a hazardous waste. Instead, as previously described (see pages 26-27, *supra*), there are many economic

National League of Cities states a claim repeated in many of the briefs regarding the extent to which incineration of municipal waste decreases the volume and mass of waste to be landfilled. The brief asserts (p. 3) that "[i]ncineration reduces pressure on landfill capacity by reducing the volume of MSW by up to 90% and the mass by approximately 75%." But, in a more candid setting, the National League of Cities recently advised its members quite differently:

Often, the claim is made that 'incineration reduces the volume of waste by 75%' or some other high percentage. This claim can only be supported by making some misleading comparisons between the volume and weight of a typical ton of MSW and volume and weight of incinerator ash. The claim cannot be supported when you consider the overall garbage disposal needs of the entire community.

Municipal Incinerators: Fifty Questions Every Local Government Should Ask, 7 (National League of Cities, Dec. 1988). The National League of Cities stated that the "bottom line is that once it builds a WTE [waste to energy] facility, the community will still need approximately 40 percent of the landfill volume it would have needed without incineration." *Id.*

There is likewise reason to question the accuracy of the ten-fold cost differential between Subtitle C and Subtitle D landfills suggested by EPA (Pet. App. 48a-49a), which is repeated by the City and its amici. According to EPA's economic analysis of the new Subtitle D regulations, the average cost per ton of disposal under the new Subtitle D regulations will be approximately 2/7 of the average cost per ton of disposal under Subtitle C (see 56 Fed. Reg. 50986-50988 (1991)). Perhaps the ten-fold cost figures are derived from the old, less exacting Subtitle D regulations.

alternatives readily available to the City (separation of fly ash from bottom ash and materials separation programs) for reducing the volume of hazardous ash that its incinerator produces. For that reason, the likely effect of a ruling that Section 3001(i) does not immunize incinerator ash from RCRA Subtitle C regulation may well be to reduce significantly the amount of ash that is hazardous.¹⁷

III. THE LEGISLATIVE HISTORY OF RCRA SECTION 3001(i) DOES NOT SUPPORT EXEMPTING HAZARDOUS ASH FROM SUBTITLE C REGULATION

The City's reliance (Br. 23-28) on legislative history is no more persuasive because much of the City's argument depends on the same misimpression of RCRA's promotion of resource recovery and of Subtitle C. See Br. 23-24. In fact, if the legislative history is at all relevant in construing a provision whose meaning is already plain (see *Burlington Northern R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987)), it supports the narrower reading of Section 3001(i). The legislative history of the Hazardous and Solid Waste Amendments of 1984 (HSWA) reveals that Congress sought to close regulatory gaps, not create new ones. And, rather than support the City's claim, the committee report language upon which the City relies is unavailing. It only underscores the impropriety of such a report serving as a basis for adding language not contained in a statutory provision enacted by Congress. Finally, there is no merit to the City's claim that the legislative history demonstrates that Congress

¹⁷ Reportedly, much of the current economic plight of these municipal waste incinerators results from increased recycling and source separation, which reduces the amount of municipal waste available for incineration. See J. Bailey, *Fading Garbage Crisis Leaves Incinerators Competing for Trash*, WALL ST. J. A1 (Aug. 11, 1993); B. Meier, *Finding Gold, Of a Sort, in Landfills*, NYT A14:4 (Sept. 7, 1993). RCRA, however, can hardly be read as intending to discourage waste minimization in order to create material for incinerators to destroy.

ratified EPA's pre-existing regulation that extended the household waste exclusion to ash residues.

A. The City's legislative history argument rests principally on the appearance of the word "generation" in part of a Senate Report purporting to describe the import of the language now contained in Section 3001(i) (then Section 3001(d)). Reproduced in context, the Senate Report provides:

New section 3001(d) clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

All waste management activities of such a facility, including the generation, transportation, treatment, storage, and disposal of waste shall be covered by the exclusion * * *.

S. Rep. No. 98-284, 98th Cong., 1st Sess. 61 (1983).

The first sentence simply confirms the driving force behind the clarification: to allow the mixture of household wastes with nonhazardous wastes from other sources. It is the second sentence, particularly its addition of the word "generation," upon which the City ultimately rests its entire case.

There has recently been much debate within this Court regarding the precise weight to be given legislative history in interpreting the meaning of ambiguous statutory language.¹⁸

¹⁸ Compare, e.g., *Immigration and Naturalization Service v. Cardozo-Fonseca*, 480 U.S. 421, 433 n.12 (1987), *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454-55 (1989), and *Green v. Bock Laundry Machine*, 490 U.S. 504 (1989) with *Public Citizen v. United States Department of Justice*, 491 U.S. at 470-74 (Kennedy, J., concurring), *K Mart v. Cartier, Inc.*, 486 U.S. 281, 291-93 (1988), *Immigration and Naturalization Service v. Cardozo-Fonseca*, 480 U.S. at 452-53 (Scalia, J., concurring); and *Sable*

There should be no debate, however, on the impropriety of relying on the word "generation" to support the City's proffered interpretation. What the City seeks, in effect, is the addition of language that is missing from the statute. Congress, however, must legislate through legislation, not through legislative history.

To be sure, there are no doubt circumstances where courts are compelled to override the literal language of a statute, such as when necessary to avoid an obvious technical error or an absurd result. Cf. *Green v. Bock Laundry Machine*, 490 U.S. 504, 510 (1989). But under no circumstances can it be warranted where, as here, what the City seeks would amount to a huge expansion in the substantive scope of an exception to a public health law. Here, there is no suggestion in the legislative history that Congress ever considered the costs and benefits of such an exception and chose to embrace it. There is no suggestion in the legislative history that the absence of such an exception would defeat the purposes of the law or otherwise produce an untenable or absurd result that Congress could not have intended. Instead, as described above (pages 20-27, *supra*), the converse is closer to the mark.

Indeed, the sharp contrast between the committee report language and the actual statutory language -- with "generation" appearing in the former, but not the latter -- only underscores the impropriety of substituting the former for the latter. It suggests the possibility of committee staff awareness of the distinction, coupled with the inability, for whatever reason, to obtain a substantive change in the wording of the statute itself. The court of appeals below well explained why a court should not defer to a legislative report's addition of the term "generation" to those activities exempted from Subtitle C: "Why should we, then, rely upon a single word in a committee report that did not result in legislation. Simply put, we shouldn't." Pet. App. 18a. Where, moreover, as in this case, that addition portends such a significant expansion in the scope of Section 3001(i)'s reach, the resulting distinction between statute and report must be dispositive. See

Communications v. FCC, 492 U.S. 115, 133 (1989) (Scalia, J., concurring).

American Hospital Ass'n v. National Labor Relations Board, 111 S. Ct. 1539, 1545 (1991).¹⁹

B. The City alternatively argues (Br. 25-28) that the legislative history demonstrates congressional intent to ratify EPA's 1980 household waste exclusion, which extended to "residues" remaining after incineration of household waste. See 45 Fed. Reg. 33099 (1980). This argument, too, lacks merit. None of the indicia necessary to support congressional ratification of an existing agency interpretation is present in this case.

¹⁹ Several Senators who were members of the Senate Environment and Public Works Committee at the time of the senate report and the same Senate Committee (Environment and Public Works) have since expressed the view that Section 3001(i) does not exempt hazardous ash from Subtitle C. See Pet. App. 12a-13a (summarizing letters sent to EPA by Senators Stafford, Durenberger, Chafee, Burdick, Baucus, and Mitchell, and Rep. Florio); S. Rep. No. 101-228, 101st Cong., 1st Sess. 258-260 (1989). In addition, Congress has repeatedly declined since 1984 to pass legislation that would permit the disposal of municipal incinerator ash in Subtitle D landfills, even when, unlike the scheme proposed by the City, such permission would be conditioned upon the establishment under Subtitle D of a distinct, more exacting regulatory framework that would cover all aspects of ash management, including handling, treatment, transportation, reuse, recycling, storage, and disposal. See *Municipal Incinerator Ash: Hearing on H.R. 2517, 4255, and 4357 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 72 (1988); *House Hearing on H.R. 2162, supra*; H.R. Rep. No. 101-1021, 101st Cong., 2d Sess. 233-234 (1991); S. Rep. No. 101-228, 101st Cong., 1st Sess. 258-260 (1989); S. Rep. No. 102-301, 102d Cong., 2d Sess. 56-60 (1992). The legislative assumption behind many of these proposals was that "[u]nder current law, municipal incinerator ash is subject to subtitle C or subtitle D depending on whether it passes or fails the extraction procedure (EP) toxicity test." S. Rep. No. 101-228, 101st Cong., 1st Sess. 258 (1989).

First, unlike the cases upon which the City relies,²⁰ Congress did not merely re-enact in whole or in part pre-existing statutory language for which there was a longstanding administrative interpretation when it passed HSWA in 1984. HSWA amounted to a major overhaul of the earlier 1976 law, and Congress, in HSWA, *added* Section 3001(i) in 1984. Congress could not, therefore, have been ratifying any pre-existing interpretation of the language of Section 3001(i). Congress was adding *new* language to RCRA and speaking to the issue for the first time. If, moreover, Congress was even aware of EPA's position with regard to ash in 1984, the language Congress ultimately enacted suggests congressional rejection, not endorsement, of EPA's view. Congress even titled Section 3001(i) a "Clarification of household waste exclusion," which hardly suggests that the legislators were merely endorsing what EPA had previously done. As the court of appeals below explained (Pet. App. 18a): "Although tossed around, the word 'generation' was not used in the final product. * * * The actual words of the statute -- the end product of the rough-and-tumble of the political process -- are the definitive statement of congressional intent."²¹

Second, in virtually all of the cases in which the Court has found congressional ratification, the legislative history includes affirmative evidence that Congress was actually made aware of a

²⁰ *Merrill Lynch v. Curran*, 456 U.S. 353, 381 (1982); *Haig v. Agee*, 453 U.S. 280, 297 (1981); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

²¹ See *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2595 (1992) ("In 1984, Congress did more than reenact § 33(g); it added new provisions and new language which on their face appear to have the specific purpose of overruling the prior administrative interpretation."); see also *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) ("Where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction.").

longstanding administrative agency interpretation.²² Here, as in *Demarest v. Manspeaker*, 484 U.S. at 190, where this Court rejected a similar ratification argument, "[t]here is no indication that Congress was aware of the administrative construction * * * at the time it revised the statute." Congress can hardly be deemed, therefore, to have approved of EPA's view regarding the regulatory status of ash.

Finally, the City's reliance on ratification is misplaced because EPA's 1980 interpretation did not even address the issue presented here. The prior regulation only spoke to the question of ash produced from the incineration of household waste alone. Section 3001(i), however, permits the combustion of a mixture of household waste and other kinds of waste, which was not addressed by EPA's 1980 regulation.

The difference is significant, which is likely why EPA's first and, until recently, longstanding authoritative view was that ash generated from such a mixture was *not* entitled to the benefit of the household waste exclusion. See 50 Fed. Reg. 28726 (1985). Section 3001(i) dramatically expanded the practical scope of the household waste exclusion by allowing the mixture of household wastes with other sources of non-hazardous wastes. Under Section 3001(i), even a resource recovery facility that burns a substantial quantity of non-hazardous solid waste from non-household sources

²² *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 (1985); *North Haven Board of Education v. Bell*, 456 U.S. 512, 534 (1982); *Merrill Lynch v. Curran*, 456 U.S. at 382; *Haig v. Agee*, 453 U.S. at 297; *United States v. Board of Commissioners of Sheffield, Ala.*, 435 U.S. at 135; *Lorillard v. Pons*, 434 U.S. at 581; *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979). To be sure, in some of these very same cases, this Court speaks to how "Congress is presumed to be aware of an administrative * * * interpretation of a statute and to adopt that interpretation when it reenacts a statute without change" (see, e.g., *Lorillard v. Pons*, 434 U.S. at 580-581), but the Court has nonetheless satisfied itself that such actual awareness is present rather than rely on the obvious fiction of awareness (see, e.g., *Lindahl v. Office of Personnel Management*, 470 U.S. at 782).

is entitled to that Section's exemption. As described above, that is a confined exemption from Subtitle C to the extent that the exemption means that the facility shall not be considered a Subtitle C TSD facility, notwithstanding its processing of the hazardous materials in household waste. But under the City's view, hazardous ash produced from such a facility -- the hazardous constituents of which could come from the non-hazardous solid waste and accumulate in the ash -- would likewise be exempt from Subtitle C. Hence, the "household waste" exception would be transformed into a far broader waste stream exemption for resource recovery facilities that burn large amounts of non-household solid waste and generate hazardous ash. Entities subsequently managing that ash would, under the City's reading, be exempt from Subtitle C. Nothing in RCRA suggests that Congress intended to create such a regulatory loophole so far removed from the purposes of the household waste exclusion.

IV. EPA'S VIEW THAT SECTION 3001(i) EXEMPTS MUNICIPAL INCINERATOR ASH FROM RCRA SUBTITLE C REGARDLESS OF ITS HAZARDOUSNESS IS NOT ENTITLED TO JUDICIAL DEFERENCE

In the alternative, the City endorses (Pet. Br. 29-34) EPA's contention that the statutory language is ambiguous and that the Court should therefore defer to EPA's interpretation, which currently supports the City. No such deference is owed EPA, however, because the statutory language is plain. In addition, EPA's current view is not the kind of authoritative interpretation reached pursuant to legislatively delegated lawmaking authority that is entitled to judicial deference.

A. "Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), if a statute is unambiguous, the statute governs * * *." *Stinson v. United States*, 113 S. Ct. 1913, 1918 (1993). Accordingly, this Court has repeatedly rejected an agency's interpretation when contrary to the

statute's plain meaning.²³ And, the Court has deferred to the agency's interpretation only where "Congress' silence or ambiguity has 'left a gap for the agency to fill.'" *Stinson v. United States*, 113 S. Ct. at 1918, quoting *Chevron*, 467 U.S. at 842-43.

Section 3001(i) is ambiguous, according to EPA (U.S. Br. 11), because the City's suggested construction is "plausible" and because "'Congress has not directly addressed the precise question at issue'" (quoting *Chevron*, 467 U.S. at 842). The Solicitor General, however, seriously misapprehends the threshold plain meaning inquiry required by *Chevron*. Indeed, under the Solicitor General's view, plain meaning would virtually never exist and *Chevron* deference would therefore almost always be warranted. The Executive Branch may desire such an approach, but that is not the teaching of this Court's precedent.

First, while for reasons already discussed (see Part I, *supra*) we do not believe that the City's reading is even "plausible," the mere plausibility of a competing construction falls far short of that necessary to persuade a court that a statute has no plain meaning. A majority of this Court has frequently relied on the plain meaning of a particular statutory provision to reject an agency construction, notwithstanding the dissenters' demonstration that an alternative, at least plausible construction, existed. See generally Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2091-2093 & nn. 97 & 103 (1990); see also Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L. J. 969, 990-993 (1992).²⁴ "An understanding that would allow

²³ See, e.g., *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589 (1992); *Demarest v. Manspeaker*, 498 U.S. 184, 599 (1991); *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116 (1990); *Department of Transportation v. Federal Labor Relations Authority*, 494 U.S. 922 (1990); *Dole v. United Steelworkers*, 494 U.S. 26, 42-43 (1990); *Sullivan v. Zebley*, 493 U.S. 521 (1990).

²⁴ "[T]he mere fact of a plausible alternative view is insufficient to trigger the *Chevron* rule." Sunstein, *supra*, 90 Colum. L. Rev. at 2091. Compare, e.g., *Dole v. United Steelworkers of America*, 494

the agency to prevail merely because there is some room for disagreement would pose an undue threat to the basic principle of congressional supremacy in lawmaking." Sunstein, *supra*, 90 Colum. L. Rev. at 2093. This Court's decisions make plain, moreover, that a merely "plausible" reading must bow in the face of a competing canon of statutory construction. See *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1230-1231 (1991); *New York v. United States*, 112 S. Ct. 2408, 2425 (1992). As described earlier (see page 8, *supra*), the City's construction flies in the face of the settled canon that exemptions from remedial legislation like RCRA must be narrowly construed.

Second, the Solicitor General misapprehends what the Court means by Congress having "directly addressed the precise question at issue" in *Chevron* analysis. The Solicitor General relies on the absence of explicit statutory language discussing the status of ash per se to conclude that a statutory ambiguity is presented. But what the Solicitor General ignores, or at least seeks to obscure, is that the absence of an exception to a clear statutory mandate does not create an ambiguity. It simply means that no such exception exists.

Here, the statute on its face squarely addresses the issue. It provides that generators of hazardous waste must comply with certain requirements and it provides that those who treat, store, and dispose of hazardous waste must comply with other requirements. The statute does not create a household waste exception for any facility other than the resource recovery facility. And, with regard to that facility, the statute does not create an exception for resource recovery facilities applicable to their status as "generators" of hazardous waste.

U.S. 26, 42-43 (1990) with *id.* at 44-45 (White, J., dissenting); compare *Public Employment Retirement System of Ohio v. Betts*, 494 U.S. 158, 175-178 (1989) with *id.* at 183-190 (Marshall, J., dissenting); *Pittston Coal Group v. Sebben*, 488 U.S. 105, 115 (1988) with *id.* at 125-126 (Stevens, J., dissenting).

Most simply put, a *Chevron* gap for an agency to fill does not exist whenever a statutory enactment fails to include an exception broader than the one actually included. Indeed, were the rule otherwise, there would never be such a thing as plain statutory language because it is always possible to imagine a statutory exception that Congress could have included, but did not. It is only where "Congress' silence * * * has 'left a gap for the agency to fill' that *Chevron* deference may be appropriate." *Stinson v. United States*, 113 S. Ct. at 1918, quoting *Chevron*, 467 U.S. at 842-43. Here, no such gap exists.²⁵

EPA understood this in 1985 when it first authoritatively construed Section 3001(i) immediately upon its enactment. EPA did not then find conflicting evidence of congressional intent with respect to whether Section 3001(i) exempts hazardous ash. EPA concluded that it did "not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste." 50 Fed. Reg. 28726 (1985). EPA understood that silence in the context of an otherwise firm statutory mandate did not create an ambiguity about what Congress intended. There was simply ~~no~~ intent to exempt hazardous ash

²⁵ This Court's construction of RCRA in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), supports our view. At issue in *Hallstrom* was the petitioners' claim that they should not be barred from maintaining their lawsuit against an alleged violator of RCRA although petitioners had failed to satisfy the notice and waiting period requirements set forth in RCRA for the bringing of a citizen suit enforcement action. See 42 U.S.C. 6972(b)(1)(A)&(B). The reasons why this Court rejected petitioners' claim are equally applicable here. The Court reasoned that "Congress could have excepted parties from complying with the * * * [statutory] requirement] * * *. RCRA, however, contains no exception applicable to petitioners' situation; we are not at liberty to create an exception where Congress has declined to do so." *Hallstrom*, 493 U.S. at 26-27.

from Subtitle C regulation.²⁶ If any EPA construction is entitled to deference, it would be this one. It reflects the agency's contemporaneous view of congressional intent immediately after the law's passage. See *Good Samaritan Hosp. v. Shalala*, 113 S.Ct. at 2159; *E.I. duPont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1978).

B. EPA's current view is not, in any event, entitled to the substantial degree of deference accorded under *Chevron*. This is both because of the number of times that EPA has changed its mind on the ash issue and the manner in which EPA reached its most recent view.

1. It is well settled that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Immigration & Naturalization Service v. Cardozo-Fonseca*, 480 U.S. at 446 n.30, quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *Pauley v. BethEnergy Mines, Inc.*, 111 S.Ct. 2524, 2534 (1991); see *Good Samaritan Hospital v. Shalala*, 113 S. Ct. at 2161. As described by the court of appeals (Pet. App. 2a-3a, 11a-16a), EPA's interpretive gymnastics on this score border on the Olympic given the number of agency flip-flops on the ash issue.

To be sure, an agency is entitled to change its mind, particularly when Congress has left a policy matter for the agency to determine. Indeed, such changes are quite often the normal product of the political process. See, e.g., *Chevron*, 467 U.S. at 863-64, 865-66. But in this case, EPA did not merely shift its

²⁶ In 1985, EPA recognized why Congress had included Section 3001(i) in HSWA: to ensure that resource recovery facilities would not become TSD Subtitle C facilities because of what they received. 50 Fed. Reg. 28725 (1985). EPA described the "principal purpose of Section 3001(i) [as] to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith efforts to avoid such a result, from becoming subject to the Subtitle C regulations." *Id.* at 28726.

policy view; the agency changed its mind regarding what Congress intended in Section 3001(i) and, in particular, whether congressional intent was ambiguous. On that question, there is no justification for a shifting agency view and, hence, no occasion for judicial deference.²⁷

2. There are yet two additional reasons why EPA's current view is not entitled to *Chevron* deference. The first relates to the context in which the agency underwent its regulatory change-of-heart and the second relates to the form that the agency used to effectuate that change.

EPA announced its change in position several months after this Court invited its views in this case (when the case was first before the Court on the City's petition) and just shortly before the filing of the government's response to that invitation. Then-EPA Administrator Reilly did so by sending an internal agency memorandum to all EPA Regional Administrators. See Pet. App. 41a. And the Solicitor General then appended a copy of that memorandum to its own brief to this Court. See *City of Chicago v. EDF*, No. 91-1328, U.S. Br. App. 1a-11a.

The Solicitor General's appending of the EPA memorandum to its brief was a thinly disguised effort to avoid the Court's precedent for the purpose of claiming judicial deference to which

²⁷ There is no merit to EPA's claims that the agency's position has not been inconsistent. The government claims (U.S. Br. 23) that "EPA has consistently recognized that Section 3001(i) is silent or ambiguous with respect to the issue presented in this case. * * * EPA has always acknowledged that a statutory gap exists that must be filled." Not so. EPA did initially say that the statute was "silent," but that was only in the sense that there was no explicit exception applicable to ash. The agency did not find that the statute was "ambiguous," but rather concluded, correctly in our view, that because of that silence the agency did "not see in this provision an intent" to exclude hazardous ash from Subtitle C. 50 Fed. Reg. 28726 (1985). Certainly, EPA never intimated that Congress had left it a "statutory gap" to be filled.

EPA would in no event be entitled. This Court has made clear that the principle of judicial deference to agency interpretation of statutory language does not apply "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988). "Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Id.* at 213; see also *Cottage Savings Ass'n v. Commissioner*, 111 S.Ct. 1503, 1509 (1991).

The reason for the sudden appearance of the EPA memorandum, just before the filing of the Solicitor General's brief was obvious, notwithstanding that memorandum's careful avoidance of any reference to this pending litigation. The memorandum sought to create the appearance of the kind of agency interpretation to which this Court would provide deference under *Chevron*. At the end of the day, however, the agency's belated views on the issue in this case are entitled to the same level of deference that they would have been absent such pre-filing machinations: none at all.

Indeed, the way in which EPA announced its new view, wholly apart from its obvious relationship to pending litigation, provides a final independent basis for declining *Chevron* judicial deference to the agency view. The United States and the City wrongly assume that this Court accords *Chevron* deference to an agency's interpretation of a statute that the agency administers regardless of the form of that interpretation. That is not the case.

The only form of administrative agency interpretation that is clearly entitled to *Chevron* deference is an interpretation reached pursuant to legislatively delegated lawmaking authority, such as a legislative rule or an adjudicative determination. Those are the only agency rules or determinations that "have the 'force and effect of law.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1978); cf. *Stinson v. United States*, 113 S. Ct. at 1918.

The proper characterization of the memorandum upon which EPA and the City rely is not entirely clear. But what is clear is

that it is not a validly promulgated legislative rule or the result of an agency adjudication. The interpretation was announced in an internal agency memorandum sent to regional agency offices. There was no pretense of compliance with the Administrative Procedure Act notice and comment requirements that apply to EPA's promulgation of legislative rules. Absent such compliance, the memorandum, including the interpretation within it, cannot be considered a valid legislative rule. *Chrysler, supra*.

EPA's unstated assumption must therefore be that the memorandum qualifies for *Chevron* deference either as an interpretive rule or as a general statement of policy, neither of which must comply with the APA's notice and comment requirements to be valid. See 5 U.S.C. 553(b); see *Lincoln v. Vigil*, 113 S.Ct. 2024, 2033 (1993). The agency's assumption is multiply flawed.

First, it is far from obvious that an agency's interpretive rule, which does not have the force of law, is entitled to the high degree of deference accorded under *Chevron*. See generally Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and Courts*, 7 Yale J. Reg. 1, 55-58 (1990); Cass Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. at 2093-2094 & n.106. One basic reason why notice and comment is unnecessary for interpretive rules is because "interpretative rules--as merely interpretations of statutory provisions-- are subject to plenary judicial review." S. Doc. No. 248, 79th Cong., 2d Sess. 18 (1946). Where, therefore, as in this case, there has been no notice and comment period, it is especially important that judicial review not be limited.

The Administrative Conference of the United States (ACUS) has recognized just that. The Conference recently recommended that courts not give *Chevron* deference to agency interpretations contained in interpretive rules unless, as is not the circumstance here, "the reviewing court finds a congressional delegation of authority to make definitive interpretations in an informal format." ACUS Recommendation 89-5, 1 C.F.R. 305.89-5. The Conference encouraged agencies to use informal means to keep the

public apprised of their statutory interpretations, but emphasized that "it is important for both agencies and courts to remember that these informal expressions should not be accorded the same weight as definitive agency interpretations." *Id.*

This Court's decisions are consistent with this approach. The Court has long characterized interpretive rules as having the "power to persuade" but not the "power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). According to the Court, such less formal interpretations are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers," but instead only to "some weight on judicial review." *Martin v. Occupational Safety and Health Review Comm'n*, 111 S. Ct. 1171, 1179 (1991) (citations omitted);²⁸ see *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) ("By way of contrast to [legislative rules], a court is not required to give effect to an interpretative regulation"); cf. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority.").

In *Davis v. United States*, 495 U.S. 472, 484 (1990), this Court likewise noted the distinction: "Although the Service's interpretive rulings *do not have the force and effect of regulations*, * * * we give an agency's interpretations and practices considerable weight *where they involve the contemporaneous construction of a statute and where they have been in long use*" (emphasis added). But, as described above, the agency's

²⁸ In *Martin*, the Court contrasted the promulgation of interpretive rules from the formal issuance of a citation and, relying on the fact that the latter "assumes a form expressly provided for by Congress" in the relevant statute (111 S. Ct. at 1179, citing 29 U.S.C. 658), concluded that an agency's interpretation of its own regulations contained in the latter was entitled to great deference. In this case, EPA's proffered interpretation is contained in a mere interpretive rule, purports to change and not interpret pre-existing agency rules, and does not "assume a form expressly provided for by Congress" in RCRA.

interpretation at issue in this case, unlike that in *Davis*, lacks those additional, crucial features. EPA's new view is inconsistent with the agency's contemporaneous construction of RCRA and has not long been in use. See also *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1235 (1991) (declining to provide *Chevron* deference to EEOC guidelines).

Second, the analysis is no different if EPA's memorandum is instead characterized as a "general statement of policy" rather than as an interpretive rule.²⁹ Such general statements of policy cannot bind persons outside the agency, precisely because they have been issued without the procedural safeguards provided by the APA. Those safeguards serve an essential function. They provide fairness to affected parties, enhance accuracy, promote reasoned agency decisionmaking and ensure a full ventilation of the relevant policy considerations prior to a formal agency determination.

The absence of such procedural safeguards also supplies the reason why general statements of policy, like interpretive rules, are not entitled to *Chevron* deference. See Anthony, *supra*, 7 Yale J. Reg. at 55. Congress has not delegated to EPA the authority to issue binding agency interpretations in a format other than a legislative rule. It is therefore no matter whether the absence of such APA procedures means that EPA's memorandum is a general

²⁹ The reason why the Reilly memorandum could be considered a "general statement of policy," within the meaning of the APA, is that interpretive rules generally do not purport to make policy. "Interpretive rules are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Chrysler*, 441 U.S. at 302 n.31, quoting Attorney General's Manual on the Administrative Procedure Act, 30 n.3 (1947). They interpret language of a statute that has some "tangible" or "specific meaning." Robert A. Anthony, *Interpretive Rules, Policy Statements, Manuals, and the Like -- Should Federal Agencies Use Them to Bind the Public*, 41 Duke L. J. 1311, 1325 & n.64 (1992); see also Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 Admin. L. J. 187, 191-192 (1992).

statement of policy or an interpretive rule. In either circumstance, it does not reflect the kind of careful and reasoned agency policymaking determination that this Court has held is entitled to *Chevron* deference. Cf. *American Hospital Ass'n v. National Labor Relations Board*, 111 S. Ct. 1539, 1546 (1991) ("extensive notice and comment rulemaking" and "careful analysis of the comments that it received").³⁰ Hence, although EPA may certainly issue such internal agency memoranda -- and indeed may need to do so in many circumstances to respond to pressing issues -- the agency cannot reasonably expect those memoranda that purport to interpret statutory language to receive *Chevron* deference.

3. Finally, the substantive inadequacies in EPA's reasoning in the Reilly memorandum underscore why *Chevron* deference is not warranted when, as here, an agency announces a new statutory interpretation in such an informal manner. EPA contends (Pet. App. 46a-49a) that its new Subtitle D Part 258 regulations are sufficient to regulate ash in a manner that will protect human health and the environment. What EPA fails to consider, however, is that those regulations do not purport to address the full range of problems that hazardous ash presents. Indeed, those regulations expressly apply only to "nonhazardous municipal waste combustion ash." 56 Fed. Reg. 51000 (1991) (emphasis added).

Hence, while EPA has repeatedly acknowledged that the pre-disposal activities associated with hazardous ash, such as its transportation, storage, and reuse, pose significant hazards,³¹ the

³⁰ Perhaps reflecting the agency's awareness that its current position may not be the result of considered deliberation, the Solicitor General advises in his brief before this Court that the Agency's view "could be revised again" (U.S. Br. 9).

³¹ See 55 Fed. Reg. 17303-17304 (1990); USEPA Office of Research and Development, Methodology for Assessing Environmental Releases of and Exposure to Municipal Solid Waste Combustor Residuals, 4-1 to 4-11, 5-1 to 5-15 (April 1991) (EPA/600/8-91/031); *House Hearing on H.R. 2162*, 101st Cong., 1st

Subtitle D Part 258 regulations do not address those issues at all. See 55 Fed. Reg. 17303-17304 (1990). The Part 258 regulations address only the design and operation of landfill disposal sites; they completely ignore these other significant activities, leaving them unregulated. Subtitle C regulation would, in contrast, provide for the kind of comprehensive "cradle to grave" approach that Congress (and heretofore EPA) has always deemed necessary for the management of hazardous waste.

In addition, EPA fails to consider that, even with respect to landfill disposal, the requirements specified under the Part 258 landfill regulations are far less stringent than those previously recommended by EPA. For instance, in 1987, EPA advised Congress that "in most locations, a composite or a double liner system will be necessary to be protective of human health and the environment." *Resource Conservation and Recovery Act Oversight, Hearings Before the Subcomm. on Hazardous Wastes and Toxic Substances of the Senate Comm. on the Environment and Public Works*, 100th Cong., 1st Sess. 445 (1987) (EPA responses to prehearing questions) (hereinafter *RCRA 1987 Oversight Hearings*). EPA further asserted that "fly ash, if handled separately, should be stored or disposed of only in a monofill" (*id.*) and that "monofilling is the preferred method of storage or disposal of bottom ash or combined (fly ash and bottom ash) but [we] realize that in some cases co-disposal may be the best available option" (*id.* at 444). The Part 258 regulations, however, express no preference for monofilling; nor do they establish additional requirements applicable to co-disposal units.

EPA had also, understandably, previously supported more stringent design requirements for the disposal of fly ash than for the disposal of bottom ash. EPA specified that fly ash be monofilled only in a double-lined facility (as is generally required under Subtitle C) that utilizes a leachate collection system above and between the liners. *RCRA 1987 Oversight Hearings, supra*, at

Sess. 45, 46-48, 50-51 (1989) (testimony of Sylvia K. Lowrance, Director, USEPA Office of Solid Waste); see also R.34 at ¶18.

444-445 In contrast, Part 258 includes no such requirement applicable to the monofilling of fly ash.

Finally, EPA ignores a critical underlying assumption that it made when it promulgated its final Part 258 regulations. EPA concluded that those regulations would be adequate to protect human health and the environment based on the assumption that "the quality of leachate from [municipal solid waste landfills] will improve over time." 56 Fed. Reg. 50982 (1991). In particular, EPA anticipated "positive changes in the leachate resulting from * * * the addition of new RCRA hazardous waste listings and characteristics * * * [which] would divert waste currently disposed of at subtitle D facilities to subtitle C facilities." *Id.* Of course, EPA's new view regarding the *nonapplicability* of subtitle C to hazardous ash will have the exact opposite effect. It will increase the presence of hazardous constituents at subtitle D landfills and therefore decrease the quality of the resulting leachate.

EPA, however, offers no explanation for its change-of-heart regarding the effectiveness of the Part 258 regulations to address the problems of hazardous ash. Nor does the Solicitor General confront the issue in the government's brief in this case. The likely reason why neither does also provides the reason why *Chevron* deference is not warranted. EPA's new view is not based on the kinds of rulemaking or adjudicatory records that provide for a full ventilation of the issues and promote reasoned decisionmaking.³²

³² Notably, EPA's current stance on the regulatory status of ash under RCRA is difficult to square with the analogous issue of how domestic sewage should be regulated under RCRA. RCRA specifically excludes "solid or dissolved material in domestic sewage" from the definition of "solid waste" (and therefore "hazardous waste" because hazardous waste is a subset of solid waste). See 42 U.S.C. 6903(27), 6903(5). This exclusion extends, like the household waste exclusion, to "any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly-owned treatment works for treatment." 40 C.F.R. 261.4(a)(1)(ii). The rationale of the domestic sewage exception is not unlike that of the household waste

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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exclusion: to promote the operation of municipal waste treatment facilities when doing so does not create unreasonable environmental risks. In the context of domestic sewage, however, EPA has properly recognized the limits of that rationale. EPA has concluded that when the sludge resulting from that treatment facility is toxic, meaning that it fails EPA's toxicity test, that waste must be disposed of as a hazardous waste under RCRA Subtitle C. See 52 Fed. Reg. 23478 (1987); see also 58 Fed. Reg. 9248, 9253 (1993). The domestic sewage exception no longer applies. Of course, that is precisely why the household waste exclusion should no longer apply to ash resulting from the treatment of a mixture of household waste and other wastes, when that ash is hazardous.

APPENDIX

RELEVANT STATUTORY PROVISIONS

Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. 6921(i), provides:

(i) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if--

- (1) such facility--
 - (A) receives and burns only--
 - (i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
 - (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
 - (B) does not accept hazardous wastes identified or listed under this section, and
- (2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

Sections 1004(6) & (7), 42 U.S.C. 6903(6) & (7) provide:

(6) The term "hazardous waste generation" means the act or process of producing hazardous waste.

(7) The term "hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.